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C&K Insulation, Inc. and Heat and Frost Insulators and Asbestos Workers Local #38. Case 3-CA-24151

July 31, 2006

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On September 29, 2003, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

This case involves an attempt by three overt union applicants, Paul Raymond Johnson, Keith Wagner, and Thomas Davitt, to gain employment with the Respondent beginning on January 7, 2003.² Based on the Respondent's conduct, the judge found that from about January to May 22, when the Respondent offered them instatement, the Respondent refused to consider for hire and hire Johnson, Wagner, and Davitt because of their union affiliation. For the reasons stated in the judge's decision, we agree that the Respondent violated Section 8(a)(1) and (3) by refusing to hire the applicants. For the reasons stated here, we also agree with the judge that the Respondent further violated Section 8(a)(1) and (3) by refusing to consider the applicants for hire.³

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² Unless stated otherwise, all dates are in 2003.

³ Because we agree with the judge that the Respondent did not adequately explain why it did not hire—or consider for hire—Johnson, Wagner, and Davitt after it had recently lost three experienced employees, or why over the course of several months it additionally hired employees Duane Harty, James Jardine, Scott Disbrow, and Thomas Disbrow instead of the union applicants, we find it unnecessary to decide whether, as the judge implies, employee Ken Moseman also was hired to fill a vacancy for which the union applicants should have been considered.

On the basis of extant Board precedent, Member Schaumber adopts the violations found herein.

To establish a discriminatory refusal to consider, pursuant to *Wright Line*,⁴ the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. *FES*, 331 NLRB 9, 15 (2000), enfd. 301 F.3d 83 (3d Cir. 2002). Once this is established, the burden shifts to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation. *Id.*

The record establishes that the Respondent excluded the applicants from the hiring process. Johnson, Wagner, and Davitt applied for work at the Respondent's main office on January 7.⁵ At the time they applied, they wore clothing with the Union's insignia. After seeing the union insignia, C. Ingraham volunteered that the Respondent was not a union company. Thereafter, the Respondent gave inconsistent information on its need for employees, with C. Ingraham saying that there was quite a bit of work coming up in the future and that the Respondent might possibly be looking for new employees and Ingraham saying just the opposite—that there was not much work available and that he would have laid off some employees had they not already left because work was slow.

The Respondent's gratuitous comment that it was not a union company, and its providing inconsistent information on its hiring needs, suggest that it did not take these applications seriously. On the other hand, consistent with its usual hiring procedure, the Respondent gave application forms to Johnson, Wagner, and Davitt at their request and accepted the completed forms from them. An employer's acceptance of applications generally supports a finding that the employer considered the applications. See *Eckert Fire Protection*, 332 NLRB 198 (2000) (dismissing refusal-to-consider allegation where there was no evidence that the respondent refused to accept applications from alleged discriminatees or otherwise indicated that it would not consider union-affiliated applicants). However, it is not determinative. Rather, in determining whether an employer has excluded applicants from the hiring process, the Board considers all of the surrounding circumstances. See *Wayne Erecting, Inc.*, 333 NLRB 1212 (2001) (failure to consider established where respondent accepted union adherent's ap-

⁴ 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

⁵ The Respondent's main office is located in the home of its owner, Chester Ingraham. Ingraham's wife,Carolynn Ingraham, works in the main office as the company estimator.

plication but also made comments indicating it had excluded him from hiring process because of his union affiliation).

On balance, we would not find a refusal-to-consider violation based solely on the events of January 7.⁶ However, subsequent events make clear that the Respondent went through the motions of considering the applicants but in reality excluded them from the hiring process. Thus, the applicants returned to the Respondent's facility on February 4 after not hearing from the Respondent about their applications. Ingraham responded to their inquiry in a hostile manner and told them that they were talking bad about him and "running him down on the job." He further stated that they were not welcome at the Respondent's jobsites, and if they ever showed up at another job again, he would call the police. He then asked why they were picking on him. Wagner replied that they were not picking on him, and that they just wanted to work for him.⁷

Ingraham's February 4 statements leave little doubt that he had no intention of considering the applicants for employment.⁸ See *Corporate Interiors, Inc.*, 340 NLRB 732, 749–752 (2003) (refusal to consider where respondent gave application forms to union applicants and accepted one completed form, but also told them he knew their "f—ing game" and was not going to play it, and that they could jump in a lake); *Wayne Erecting, Inc.*, supra. In addition, there is no evidence that the Respondent actually considered any of the applicants for its openings after January 7. Instead, after telling the applicants that it was not hiring, the Respondent hired Duane Harty on February 3, James Jardine on March 11, and Tom Disbrow and Scott Disbrow on March 24.⁹ Moreover, Ingraham directed the Disbrows to backdate their applications to make it appear they had applied in December,

⁶ Cf. *C. T. Taylor Co.*, 342 NLRB 997 (2004) (finding that union applicants were not excluded from the hiring process where they were provided with applications which were accepted and filed, but the applicants were not considered for hire because they did not call for an interview as was the respondent's requirement); *Ken Maddox Heating & Air Conditioning*, 340 NLRB 43 (2003) (dismissing failure to consider allegation based on evidence that employer handled the union applications consistent with established, nondiscriminatory practices).

⁷ They also discussed whether the Respondent paid prevailing wage rates.

⁸ Our consideration of the events on February 4 is consistent with the relevant complaint allegation. The complaint alleges that "[s]ince on or about January 7, 2003, Respondent has refused to consider for hire the following employee-applicants: Paul Raymond Johnson, Keith Wagner, and Thomas Davitt." Accordingly, in our analysis of whether the Respondent unlawfully refused to consider the alleged discriminatees for hire, we consider the Respondent's entire course of conduct.

⁹ The judge found, and we agree, that the Respondent's reasons for hiring Harty, Jardine, and the Disbrows, rather than the union applicants, were pretextual, and, accordingly, discriminatory.

before the union applicants, and told them this was to "help him from getting involved in the union." Taken together with the events of January 7 and February 4 discussed above, these facts demonstrate that the Respondent excluded the applicants from its hiring process. See also *CNP Mechanical Inc.*, 347 NLRB No. 14, slip op. at 11–12 (2006) (refusal to consider where respondent told union applicants it was not hiring and then hired nonunion applicants and directed them to backdate their applications).

We further find that the Respondent's antiunion animus contributed to its decision not to consider the applicants for employment. Ingraham's request that recent hires backdate their applications to "help him from getting involved in the union" is evidence of the Respondent's animus. See *Caruso Electric Corp.*, 332 NLRB 519 fn. 2 (2000); *Pan American Electric*, 328 NLRB 54 (1999). Ingraham's threat to exclude the union applicants from the jobsite and contact the police also demonstrates the Respondent's antiunion animus. *All Seasons Construction, Inc.*, 336 NLRB 994, 999 (2001) (respondent refused to accept applications from union applicants, falsely told them it was not hiring, ejected them from its facility, and threatened to call the police). Accordingly, the General Counsel has satisfied his *FES* burden.

Under *FES*, the burden thus shifts to the Respondent to prove, as an affirmative defense, that it would not have considered the applicants even in the absence of their union activity. To establish this affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enf. mem. 99 F.3d 1139 (6th Cir. 1996). The Respondent does not contend that it would not have considered Johnson, Wagner, and Davitt for employment even absent their union affiliation. Instead, the Respondent contends that it did consider them. In support of its assertion, the Respondent points to its physical acceptance of the applications. However, as discussed above, we do not find merit in this argument.

Thus, for all of the foregoing reasons, we find that the Respondent's refusal to consider for hire Johnson, Wagner, and Davitt violated Section 8(a)(1) and (3) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, C&K Insulation, Inc., Bing-

hampton, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. July 31, 2006

Peter C. Schaumber, Member

Peter N. Kirsanow, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Robert Ellison, Esq., for the General Counsel.

Joseph Steflik Jr., Esq. (Coughlin & Gerhart, LLP.), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on July 23 and 24, 2003, in Binghamton, New York. The complaint herein, which issued on April 15, 2003,¹ and was based upon an unfair labor practice charge and an amended charge that were filed on March 19 and April 8 by Heat and Frost Insulators and Asbestos Workers Local # 38 (the Union), alleges that since on about January 7, C & K Insulation, Inc. (the Respondent) refused to consider for hire and refused to hire employee-applicants Paul Raymond Johnson, Keith Wagner, and Thomas Davitt because of their union and protected concerted activities, in violation of Section 8(a)(1) and (3) of the Act.²

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

The Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

This case involves the alleged refusal to consider for hire, and to hire, Johnson, Wagner, and Davitt beginning on January 7. Johnson has been the president and organizer for the Union, a full-time paid position; Wagner is a regional organizer for the Mid Atlantic States' Conference for the International Union

and Davitt is employed by Local 30 of the same Union as an organizer, both full-time paid positions. Johnson and Davitt's offices are located about an hour's drive from Binghamton, where the Respondent is located. Wagner lives in Maryland, about 260 miles from Binghamton.

On January 6, Johnson went to a jobsite at SUNY Binghamton to check on some insulation work that was being performed there. While there he met Art Ingraham and Jeremy Wallace, who were working at the jobsite, and they told him that they were employed by M&G, but that they had recently left their employment with the Respondent and, therefore, the Respondent might be in the need of employees. Johnson called Wagner and Davitt, told them of the situation, and they met at the SUNY jobsite the following day. After again speaking to Art Ingraham and Wallace, they decided to go to the Respondent's main office, which is also the home of the Respondent's owner, Chester Ingraham (Ingraham), to apply for employment with the Respondent as overt salts.

They arrived at the Respondent's facility late in the afternoon on January 7. Johnson was wearing a union jacket with the union insignia on the back and a union patch on the front. Davitt was wearing a Local 30 hat and Wagner was wearing a union building trades' jacket. They knocked on the front door and were met by Carolyn Ingraham, Ingraham's wife (C. Ingraham), who is an estimator for the Respondent and also performs some office work. Johnson testified that they told her that they wanted to apply for work and she said that they were not a union company. They said that didn't matter, but they would like to work for the Company and she gave them employment applications, which they each completed. They asked about the work situation, "and she made the comment that there was work." When they asked if the Company was hiring at the time, she said that she didn't know. In addition, "she did allude to the fact or make the comment that there was quite a bit of work coming up in the future here and that they might possibly be looking." While they were completing the applications, she walked out of the room and, a short time later, Ingraham came into the room and introduced himself. Davitt asked him how long their applications would be valid, and he said that they would be kept for a year. Ingraham was asked about work, and he said there wasn't much work available. They asked him about wages, and he said the starting hourly rate would be \$10.50 on private jobs and the "full amount" for prevailing rate work. They told him that they had met two of his former employees, and Ingraham said that if they hadn't left he would have had to lay them off because work was slow. They handed in their applications and left. Johnson testified that if he had been offered employment on January 7, or between January 7 and May 22, when he was offered employment, he would have accepted it.

There was a substantial amount of testimony from Johnson, Davitt, and Wagner, principally during their cross-examination, about salting and salting techniques, and whether they were really interested in working for the Respondent or whether they applied solely to organize the Respondent's employees. Johnson's testimony in this area (and to a lesser degree Davitt and Wagner) was not very credible. Initially he testified that his purpose in applying to work for the Respondent was because, "I

¹ Unless indicated otherwise, all dates referred to relate to the year 2003.

² Counsel for the General Counsel's unopposed motion to correct transcript is granted.

wanted a job.” When asked if that was the only purpose, he testified, “And organize the company.” He later testified, rather sarcastically, that another reason that he applied to work for the Respondent was because his wife wanted him to buy her a van, yet he never applied to work for a union contractor, which obviously would have paid a higher hourly wage. There was similar testimony from Davitt and Wagner. None of this will be discussed further because under Board and court law, it is irrelevant and no defense to the allegations herein. Since the Supreme Court’s decision in *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), the law has been clear that paid union organizers, acting as salaried employees, are employees within the meaning of Section 2(3) of the Act. Further, Johnson, Wagner, and Davitt did not act in a “disruptive, intimidating and disrespectful” manner on January 7, *Exterior Systems, Inc.*, 338 NLRB 677 (2002), nor did they convince any of the Respondent’s employees to leave its employ for a union job (“stripping”), *Abell Engineering & Mfg. Inc.*, 338 NLRB No. 434 (2002). Therefore, the testimony on this subject will not be discussed further nor will it be considered.

Wagner testified that C. Ingraham let them in to the office and they said that they were insulators looking for work and asked for employment applications. At the time he was wearing a jacket with a union building trades logo. She gave them applications which they proceeded to fill out. She told them that they were not a union shop and they said that wasn’t a problem, they were there to work. They asked if the Company was hiring and she said that she didn’t know. They asked about the workload, and she said that they were pretty busy with a decent backlog of work. They completed the applications and returned them to C. Ingraham. Shortly thereafter, Ingraham arrived and they asked if he was hiring, and he said that he was not, “in fact, things were slowing down.” They asked about wages, and Ingraham mentioned a figure of about \$10.50 an hour. They said that they were worth more than that, but they would be willing to work for whatever he was offering and would prove themselves. Davitt asked how long the applications would be kept on file, because they said 45 days, and Ingraham said that they would be maintained for a year. Wagner asked if he had a lot of applications on file, and he said that he didn’t. He testified that if he had been offered employment by the Respondent at that time or thereafter, he would have accepted the job offer.

Davitt testified that Carolynn was in the office when they arrived on January 7. He was wearing a hat with the International union name and logo on it. They asked if they could have employment applications, and she gave them the applications. She said, “[T]hey were going to be busy, you know, had a lot of work and they’d be looking for some people.” She also told them that the Respondent was not a union company. He saw that while they were completing the applications, she was making a telephone call and, shortly thereafter, Ingraham arrived. They asked him how the work was, and he said that the work was slow, that he was probably going to be laying people off. When they told him that they met his two former employees now working for M&G, Ingraham said that he was happy that they had left, otherwise he would have had to lay them off. Johnson asked what a mechanic with 15 years experience would earn, and he said between \$10 and \$11 an hour. Davitt

asked how long their applications would be held and Ingraham said that they would be held indefinitely. He testified that if he had been offered employment by the Respondent in January, February, or March, he would have accepted the job.

Ingraham testified that he returned to the office when he received a telephone call from C. Ingraham on January 7 that Johnson, Davitt, and Wagner were there. While there, one of them commented that three of his employees had either quit or were about to quit, and he responded that they did him a favor because he might have had to lay them off if they didn’t quit because the work was slowing down. Of the three, Art Ingraham left in October or November and Jeremy and Todd Wallace left the last week in December 2002 or the first week in January. All went to work for M&G. Before Johnson, Wagner, and Davitt left, they gave Ingraham their employment applications; at the time, he had about three other applications on file.

Johnson’s application³ states that he completed the 4-year apprenticeship program in 1996 and lists his “Work Experience” from June 1995 to March 2000 when he was employed by Parson Insulation; from April 2000 to June 2001, by Superior Insulation, and since June 2001 he has been president and organizer of the Union. Wagner’s application also states that he completed a 4-year apprenticeship program, and that he was employed in the industry from 1976 to 1995 (“Listing of contractors available on request”) and that since 1995 he has been an organizer for the Union. Davitt’s application states that he has been an apprentice instructor for 10 years and was employed in the industry from 1972 through December 1996 and in January 1997 he became business manager for Local 30 and teaches at the apprentice school. He became a journeyman in 1976. Ingraham testified that he had some doubts about their abilities because of the gaps in their work records: “Mr. Davitt had been better than six years since he worked with the tools. Mr. Wagner in excess of eight years working with the tools. Mr. Johnson...was the most recent one.”

Not having heard from Ingraham, Johnson and Wagner returned to the Respondent’s facility on February 4. Johnson testified that Wagner did all the talking for him. He asked about their applications and Ingraham “made reference to us talking bad about him.” He said that they were “running him down on the job.” Ingraham told them “that we’re not welcome on any jobs and told us that he told his men that if we ever show up on another job again that they are to escort us off and call the police.” Wagner asked him if he had hired anybody and he said that he didn’t hire anybody and wasn’t planning to hire anybody. Ingraham asked Wagner why they were picking on him, and Wagner said that they weren’t picking on him, that they wanted to work for him. Johnson testified that he does not recall whether Wagner accused Ingraham of not paying prevailing rate wages on public jobs at this meeting and that he does not believe that Wagner threatened to have the Respondent investigated regarding prevailing rate violations, although he does remember Wagner saying, “So, you wouldn’t mind being investigated.” In addition, Johnson filed prevailing wage rate

³ The applications for employment used by the Respondent are of a “generic” nature, without the Respondent’s name printed therein, and are probably available at stationary stores.

violation claims with a Government agency after this meeting, but he could not recollect how many complaints he filed. By letter to Johnson dated May 22, the Respondent offered him "unconditional employment." The letter gave him until May 29 to respond. Because he couldn't begin by that day, Ingraham gave him additional time, and he began working for the Respondent on June 4 and, at the time of the hearing, was still employed by the Respondent.

Wagner testified that as they had not received any response from the Respondent about their employment applications, they returned to its facility on about February 4. They asked about their applications, and Ingraham and C. Ingraham's "temperament became a little hostile, they wanted to know why we were picking on their company." Wagner said that they weren't picking on them, they just wanted to ask about their applications. He asked Ingraham if he had hired anybody, and he said no. He testified that he did not accuse Ingraham of failing to pay proper prevailing wage rates; he did question Ingraham as to whether he was paying the proper rates. Like Johnson, he received an unconditional offer of employment from the Respondent dated May 22. He did not accept, nor did he respond, because he was involved in other campaigns at the time. Davitt was also sent an unconditional offer of employment on May 22, although his testimony is somewhat confused on this point. He, apparently, began working for the Respondent on June 2, worked about a day or 2, and went "on strike." About a week prior to the hearing herein, he went to the Respondent's office where he allegedly made an unconditional offer to return to work. He testified that Ingraham told him that if he ever returned, he would contact the sheriff.

Ingraham testified that when Johnson and Wagner returned to his office in February, Wagner did most of the talking. He asked if they had done any hiring, and Ingraham said no. Wagner said that he just hired some people, and Ingraham said that he hired an apprentice. Wagner was getting irate, shook his finger under Ingraham's nose and said that he wasn't paying premium rates, and how would he like to be investigated. Ingraham said that he wasn't doing anything wrong, and that they could investigate him if they wanted to. Ingraham said that it was best if they left, and that they come return at a later date. He testified that his failure to offer employment to Johnson, Wagner and Davitt between January 7 and May 22 was unconnected to their union positions.

Scott Disbrow has been performing insulation work for approximately 20 years and has been a member of Local 30 for 2 years. He lives in Elmira, New York, about an hour drive from the Respondent's facility. He testified that his last employment in the industry was with an employer named Atlantic, a union contractor. That employment ended just before Christmas. In late February, Davitt, his business agent, told him that the Respondent was hiring and he could apply to work there. At the beginning of March, he called the Respondent's office and spoke to C. Ingraham, who said that they were looking for experienced help and were accepting applications. He told C. Ingraham that he worked with his son at a previous job and she said that his son could submit an application as well. Disbrow went to the Respondent's facility on about March 7 with his son Thomas. At that time he met with Ingraham and C. Ingraham

and both he and his son completed employment applications, but neither was given a copy of their application. His application is dated March 7 and lists two prior employers, one from 1983 to July 1999 and the other from January 2000 to July 2002. The application makes no mention of unions. He testified that he did not list his employment with Atlantic, "To show that it wasn't union tied" although neither Davitt nor any other union representative told him to omit any reference to union employment.

Johnson testified that on about February 26 he spoke to Disbrow about applying for work as a salt with the Respondent. Disbrow had "concerns" about doing it, but Johnson told him that if he was hired by the Respondent it would help prove that they were discriminating against Johnson, Wagner, and Davitt. On March 7, he and Wagner met with Disbrow and Thomas and told them what to do and what to say when they applied for work with the Respondent. They told him to list only nonunion employers and to "stretch the dates of the employment to create less gaps" as much as possible in the application. Since Disbrow had 20 years experience in the industry, he had good credentials to apply to work for the Respondent.

Disbrow testified that he received a telephone call from C. Ingraham on March 10. She told him that Ingraham looked over his application and wanted him to come to the facility for an interview. He and Thomas went to the Respondent's facility on the following morning. Ingraham asked him some questions about his experience and said that they needed some help and would hire Disbrow at a starting salary of \$12 an hour and Thomas at \$8 an hour, "and we could work as a team." Disbrow said that he was worth more than \$12 an hour and Ingraham said that he would reevaluate him and, in addition, he had some prevailing rate work coming up. Ingraham wanted him to begin working "right away," but Disbrow told him that his sister, who had three children, had recently died and he had to go to court and care for the children. Disbrow called Ingraham on March 21 to tell him that they were available, and he and Thomas began working for the Respondent on March 24. Ingraham testified that he hired Disbrow principally because of his experience in the trade and Thomas because he thought it would work out well for him to work with his father. He made the decision to hire them about a week before they started because work was starting to pick up at that time.

Disbrow testified further that in the March 21 telephone call with Ingraham, Ingraham told him that "he'd like to put us to work but he had problems with the union, wanted to know if me and my son could redo our applications." He told Disbrow that the union people had filled out applications before he did and he wanted to show that Disbrow's application was received first. Ingraham told him to come to the office on March 24, redo the application, and go right to work from there. Disbrow and Thomas went to the office on that morning and met with Ingraham and C. Ingraham. Their March 7 applications were on the table with another set of applications to fill out. Ingraham told them to copy what was contained in the March 7 application, but date it December 17 and that doing so "would help him from getting involved in the union." After completing the application which he dated December 17, when nobody was looking, Disbrow took the two applications dated March 7 from

the table in front of him. He had not previously been given those applications, and "I knew what I was getting into and I just kept it for, basically, today." After completing the applications, Disbrow and Thomas left to begin their first day of employment for the Respondent.

Ingraham testified that the only time that Disbrow and Thomas applied for employment with the Respondent was in mid-December 2002. He didn't hire them at that time because: "I didn't need anybody at that time." He hired them in late March because work started to pick up at about that time. He hired Disbrow over Johnson, Wagner and Davitt because he had been performing insulation work continuously over 20 years, while Johnson, Wagner, and Davitt hadn't been performing this work recently, and he hired Thomas because he worked with his father. He did not refuse to hire or consider Johnson, Wagner, and Davitt for employment because of their union positions. He testified that prior to the day before the hearing herein, he had never seen the employment applications of Disbrow and Thomas dated March 7 and never asked them to complete a second application and change the date. C. Ingraham testified that she first met Disbrow and Thomas on December 17 when they completed employment applications for the Respondent; she had never previously seen their employment applications dated March 7, a Friday. She testified that she was not present in the office on March 7 because on the first Friday of every month she takes her elderly mother shopping. Her mother receives her pension money by the third day of the month, so she takes her shopping on the first Friday of the month, and that is where she was on March 7.

In order to support the authenticity of the December 17 employment applications, counsel for the General Counsel produced testimony and witnesses to establish that Disbrow and Thomas were working that day, at a location distant from the Respondent's office. Disbrow testified that he was performing work for Atlantic at a psychiatric clinic in Ogdensburg, New York, about a 5-hour drive from his home in Elmira, New York, the week of December 16. They left early in the morning on Monday, December 16, but were delayed or prevented from getting to work that day because of a bad snow storm. They stayed at a nearby motel beginning that night, and worked the rest of the week at the Ogdensburg facility. Richard Mullen is employed by Atlantic Contractors as a branch manager. The purpose of his testimony was to identify a certain payroll record of Atlantic, which he did. This document states that Disbrow did not work on December 16, but worked 8 hours for Atlantic on December 17 and worked from December 18 through 20 as well. Also received into evidence was a calendar for December 2002 maintained by Disbrow and his wife. Written in pencil by his wife on each day from December 16 through 20 was "Hon [her nickname for him] and Tom Ogdensburg." Ogdensburg is located about 200 miles from Binghamton.

Thomas ceased working for the Respondent after about a week. The Union sent Ingraham a letter dated April 13 stating, inter alia: "Please be advised that the International Association of Heat and Frost Insulators and Asbestos Workers Union represent your employees Scott and Tom Disbrow. They will be engaged in organizing activities within your company." Shortly

after this letter was sent, he ceased working for the Respondent, and has been employed elsewhere since that time.

Ingraham testified that in the 11 years that Respondent has been in operation, his usual complement of employees was between 8 and 12, although it varied between the slow winter season and the busier spring and summer; work usually begins to improve in about March and April. During that period, he has attempted to avoid laying off employees as much as possible but, at times, he had to do it, but would offer those employees recall when work picked up. Over the years most of the employees that he hired were either family members or friends of family members. On about January 5 or 6, he placed an ad for an insulation apprentice on the State of New York Department of Labor website.⁴ This ad ran from January 6 through 24. The person who responded to this ad was Ken Moseman, who completed his employment application on January 24 and was hired on January 27. Moseman had no previous experience performing insulation work, but one factor influencing his hiring was that C. Ingraham knew him when he was growing up. The fact that he didn't have any insulation experience did not prevent Ingraham from hiring him because he enjoys training employees in insulation work. Ingraham testified that he did not consider Johnson, Wagner, or Davitt for this position because they were journeymen and the job was for an apprentice who would go through the apprentice training program that Respondent was a member of. It is his understanding that a journeyman is not eligible for this program.

Duane Harty completed a application for employment with the Respondent on either January 2 or 12.⁵ Ingraham testified that he learned of Harty's interest in employment from his son-in-law, Robert Kelly, who was a friend of Harty. Harty had no experience in insulation work, but Ingraham testified that the main factor in hiring Harty was his 2 year's experience in sheet metal work, which is related to insulation work. His most previous employment was as a cashier at a grocery store. Harty was hired on February 3 because the Company had a large amount of exterior duct work to perform, and his sheet metal experience would be valuable. Ingraham testified that Harty's sheet metal work experience was the reason he was chosen for employment over Johnson, Wagner and Davitt. Harty worked for the Respondent until March 7 when he quit to return to work at the sheet metal employer with whom he had previously been employed. James Jardine completed an application for employment with the Respondent on March 5; he was also a friend of Kelly. Jardine had no prior experience in the field and that was a factor in deciding to hire him, "because I wanted to train him myself." He began working for the Respondent on March 11 and was terminated on May 2 because of problems that he had which resulted in his being absent from work. After Jardine, Ingraham hired Disbrow and Thomas and offered employment to Johnson, Wagner, and Davitt.

⁴ The confirmation of this ad from the Department of Labor states that the job order was received from the Respondent on January 16.

⁵ On the first page of a copy of the application there appears to be a mark in front of the "2" and on the last page Harty dated it January 12. January 2 was a Thursday; January 12 was a Sunday.

On January 7, the Respondent employed the following individuals to perform insulation work: Kevin Ingraham, his son, had previously worked with Ingraham at A&D for 8 years and has been employed at the Respondent since 1992. Edward Staff, who has also been employed by the Respondent since 1992, and worked with Ingraham for A&D with for about 10 years. Matt LaMere, Ingraham's son-in-law, worked for A&D for about 6 months before being hired by the Respondent in 1993. David Gould, Ingraham's nephew, worked for A&D for about 8 years before being hired by the Respondent in 1994. Pat Murray, C. Ingraham's cousin, had about 2 year's experience in insulation work when he was hired by the Respondent in 2001, and Robert Kelly, who was also hired in 2001. Joe Araya, who also worked with Ingraham at A&D, worked for the Respondent from October 2002 to July 2003, when he resigned his employment.

Ingraham testified about the work being performed by the Respondent on about January 7. Chenango Valley School District job, in progress for about a year, required from one to three employees 2 to 3 days a week although, at times, nobody was needed. A Proctor and Gamble job in Norwich, New York, about 45 miles from Binghamton, was active from September through December 2002 with one or two employees. A PIT job in Endicott, New York, adjacent to Binghamton, that is ongoing: "You might have a guy in there for two days this week. You might not have anybody in there for two weeks." The Towanda Hospital job about 35 miles from Binghamton, which commenced in about September 2002 and was completed in about July, required employees from 2 to 5 days a week. The Warwick High School job, about a 3-hour drive from Binghamton, commenced in about April 2002 and is ongoing. Blue Mountain Elementary School, about a 2-hour drive from Binghamton, has been active since mid-2002 and employs one or two people about 2 days a week. The Clara Welsh Retirement Home in Cooperstown, New York, about an hour drive from Binghamton, ran from either July to November 2002 or from November 2002 to about April, using two to four employees 3 to 4 days a week. The John Beck Elementary School in Levitz, Pennsylvania commenced in the summer of 2002 and was ongoing. The number of individuals he employed at the site is unclear. The final worksite testified to was an Extended Stay Hotel in Plymouth Meeting, Pennsylvania, east of Philadelphia, which commenced in the fall of 2002 and was completed in about July, required one employees about 2 days a week.

IV. ANALYSIS

Counsel agree that *FES*, 331 NLRB 9, 12 (2000), is controlling herein. In that case, the Board stated:

To establish a discriminatory refusal to hire, the General Counsel must . . . [under the *Wright Line* burdens] first show the following at the hearing on the merits: (1) that the Respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the position for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3)

that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

In *FES*, supra at 15, the Board set forth the principals regarding an alleged refusal to consider violation:

the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

The major credibility issue herein relates to Disbrow's testimony regarding backdating his application for employment to December 17. This is a difficult issue because I, initially, found C. Ingraham's testimony on this subject both personal and credible. However, after a total review of the record herein I credit Disbrow's testimony regarding the two applications. I found Disbrow to be a credible and believable witness. Although his testimony may have been incorrect on some minor issues (whether the union agents told him to "touch up" dates on his employment application and who asked him to act as a salt) he appeared to be attempting to testify in an honest and open manner. In addition, Atlantic's payroll records support his testimony that he worked 8 hours in Ogdensburg, about 200 miles from the Respondent's facility, on December 17, as well as the rest of that week. Finally, the unfair labor practice charge was mailed to the Respondent on March 20 and was probably received by it the following day, the day that Disbrow testified Ingraham asked him to come in to backdate his employment application. The one suspicious factor on this issue is that the Respondent's application for employment is of a generic type that can probably be purchased at area stationary stores. Therefore, the Union, together with Disbrow, could have purchased such an application and created a fictitious application dated March 7. However, for the reasons stated above, I credit Disbrow's testimony and find that on March 21 Ingraham asked him to come to the office and backdate his application for employment to December 17, which he did.

I find that counsel for the General Counsel has satisfied all of the requirements set forth in *FES*, supra. From November 2002 to January the Respondent lost three experienced employees, and from January through March it hired five employees, Moseman, Harty, Jardine and Disbrow, and Thomas. Further, Ingraham never satisfactorily explained why he did not hire Johnson, Wagner or Davitt in January for the apprenticeship position for which it hired Moseman, even if they are journeymen, nor did he satisfactorily explain why he didn't hire them in place of Harty, Jardine, Disbrow, and Thomas. The second requirement of *FES* is clearly satisfied. Johnson, Wagner, and Davitt are each journeymen with many years experience in the industry. That there are gaps in the experience because of their present union positions is no defense herein as the evidence indicates that most of the Respondent's recent hires had little, or no experience, in the industry. Respondent could not, in

good faith, argue that they did not have the required training or experience to be hired. The final requirement, that union animus contributed to the Respondent's refusal to offer them employment until May 22 is also established. There could be no other reason for Ingraham's initial failure to offer them employment. As stated above, they were experienced, and on January 7 they told Ingraham that they would be willing to work for whatever wage rate he was offering. More directly related to this requirement is Disbrow's credited testimony that on March 21, Ingraham asked him to come to the office to backdate his application for employment because of problems that he was having with the Union. This establishes union animus. *Pan American Electric, Inc.*, 328 NLRB 54, 55 (1999); *Caruso Electric Corp.*, 332 NLRB 519 (2000). I further find a total lack of credible evidence to establish the Respondent's burden, that it would not have initially hired Johnson, Wagner, and Davitt even absent their union affiliation. He hired five employees before offering employment to them even though they had substantially more experience in the field than all except one, Disbrow. I, therefore, find that by failing to offer employment to Johnson, Wagner, and Davitt from January 7 to May 22, because of their union affiliation, the Respondent violated Section 8(a)(1) and (3) of the Act.

It is also alleged that the Respondent unlawfully failed to consider them for employment. For the reasons stated above, I find that counsel for the General Counsel has satisfied the burdens set forth in *FES*, supra, and that the Respondent has not satisfied its burden of establishing that it would not have considered them even absent their union affiliation. I, therefore, find that from January 7 to May 22, the Respondent failed to consider for employment Johnson, Wagner, and Davitt because of their union affiliation, in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. At all material times, the Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.
3. From about January 7 to about May 22, 2003, the Respondent violated Section 8(a)(1) and (3) of the Act by refusing to consider for employment, and by refusing to hire, Paul Johnson, Keith Wagner, and Thomas Davitt.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act. However, as the Respondent made valid offers of employment to Johnson, Wagner, and Davitt on May 22, 2003, I find no reason to recommend that the Respondent be ordered to do so again, and I, therefore, reject counsel for the General Counsel's argument to this effect at footnote 17 of his brief. However, I will recommend that the Respondent be ordered to make whole Johnson, Wagner, and Davitt for any loss of earnings and other benefits that they suf-

fered as a result of the Respondent's failure to consider them for employment, or employ them, for the period from January 7 to May 22, 2003, when the Respondent offered them employment, computed on a quarterly basis, less any interim earnings as set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Under *FES*, supra, this amount will depend upon the number of employees that the Respondent employed during this backpay period, which was established at the hearing, together with the pay rate of these employees, which will be determined at the compliance hearing herein.

On these findings of fact, conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, C & K Insulation, Inc., Binghamton, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to consider for hire, or refusing to hire, Paul Johnson, Keith Wagner, or Thomas Davitt because of their positions with, or activities on behalf of, the Union or other unions.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the date of this Order, make whole Paul Johnson, Keith Wagner, and Thomas Davitt for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth above in the remedy section of this decision.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its Binghamton, New York facility copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 7, 2003.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 29, 2003

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire, or refuse to consider for hire, employee-applicants because of their support for, or position with, Heat and Frost Insulators and Asbestos Workers Local #38, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole Paul Johnson, Keith Wagner, and Thomas Davitt for any loss that they suffered as a result of our failure to hire them or to consider them for hire.

C & K INSULATION, INC.